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Third-Party Plaintiff May Not Enforce Judgment for Contribution Until He Has Paid More Than His Dole Share to Plaintiff

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constitutionally permissible.[58] Defendant voluntarily entered the state expecting to form a business relationship with a New York corporation. In addition to being present in the state on the day of his visit, defendant negotiated and entered into an agreement creating an on-going relationship with a New York resident.[59] Thus, since defendant did indeed avail himself "of the privilege of conducting activities" in New York, his motion to dismiss on due process grounds was properly denied.[60] More importantly, however, *Schwartz* sheds additional light on the meaning of the "transacts any business" clause. The Court indicated that it is the nature and quality and not merely the quantity of a nonresident's contacts with New York that are determinative.[61] In evaluating these contacts, the activities of the nonresident should be viewed comprehensively and not as isolated incidents. Under these guidelines, the conclusion that defendant Schwartz transacted business in the state appears justifiable. The import of this holding seems clear: "[W]hen a defendant physically enters New York on a commercial enterprise, he will have a most difficult time persuading the court that he was not at least transacting business."[62]

ARTICLE 14 — CONTRIBUTION

Third-party plaintiff may not enforce judgment for contribution until he has paid more than his Dole *share to plaintiff.*

Article 14 of the CPLR, codifying the Court of Appeals' land-

[58] The Supreme Court has indicated that a defendant's single contact is sufficient to enable a state court to assert personal jurisdiction over him. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). In *McGee*, the defendant insurance company mailed a reinsurance certificate to a California resident offering to insure the latter in accordance with the terms of the expired agreement. The record showed this to be the only contact the defendant company had with California; nonetheless, the Court concluded that due process requirements were met. 355 U.S. at 223. The New York activities of Schwartz, *see* text accompanying note 46 *supra*, appear to be more extensive and pervasive than the contacts found acceptable in *McGee*. In fact, Dean McLaughlin has stated that the exercise of jurisdiction in *Schwartz* was within the limits of the due process clause. McLaughlin, *Long-Arm Jurisdiction*, N.Y.L.J., June 10, 1977, at 2, col. 1.

[59] 41 N.Y.2d at 653-54, 363 N.E.2d at 554-55, 394 N.Y.S.2d at 848.

[60] *See* note 58 *supra*.

[61] Thus, in assessing the exercise of CPLR 302(a)(1) jurisdiction, the nature and quality of each individual defendant's activities have to be examined to determine whether he indeed was transacting business in New York. Certain factors are deemed important by courts making such a determination: (1) who was present in the state, (2) was he a high level official of the corporation, (3) what was he doing in New York, (4) were there contract negotiations in the state, and if so, of what duration? *See, e.g.*, Moser v. Boatman, 392 F. Supp. 270, 272-73 (E.D.N.Y. 1975).

[62] McLaughlin, *Long-Arm Jurisdiction*, N.Y.L.J., June 10, 1977, at 1, col. 1.

mark decision in *Dole v. Dow Chemical Co.*,[63] provides for a right of contribution among joint tortfeasors.[64] Pursuant to CPLR 1402, a jointly liable party may recover from other joint tortfeasors "the excess paid by him over and above his equitable share of the judgment" obtained by the injured person.[65] Recently, in *Klinger v. Dudley*,[66] the Court of Appeals strictly construed this language, holding that a joint tortfeasor may not enforce a judgment for contribution until he actually has paid an amount in excess of his *Dole* share to the plaintiff.[67]

Plaintiff Klinger had commenced a wrongful death action against defendants Cookson, Dudley, and Leone. Leone filed a cross-claim against his codefendants and impleaded four additional parties, the Smiths and the Hammonds. Klinger never amended her complaint to assert a cause of action directly against any of these third-party defendants.[68] Prior to trial, defendants Dudley succeeded in having plaintiff's action against them dismissed,[69] but due

[63] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *discussed in* CPLR 3019, commentary at 231-304 (McKinney 1974); *id.* at 17-33 (McKinney Supp. 1976-1977); *The Survey*, 47 ST. JOHN'S L. REV. 148, 185 (1972); 47 N.Y.U. L. REV. 815 (1972). Prior to *Dole*, contribution among tortfeasors could be obtained only in limited situations. *See* CPLR 3019, commentary at 233-35 (McKinney 1974).

[64] Section 1401 of the CPLR provides that persons responsible for the same tort "may obtain contribution among them[selves]." CPLR 1401.

At common law, a joint tortfeasor could not obtain contribution. W. PROSSER, THE LAW OF TORTS § 50, at 305-06 (4th ed. 1971). Although this common law rule originated in 1799 in Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799), it is waning rapidly today. W. PROSSER, THE LAW OF TORTS § 50, at 307 (4th ed. 1971). It was abolished in New York in 1972. *See* Dole v. Dow Chemical Co., 30 N.Y.2d 143, 147-51, 282 N.E.2d 288, 291-94, 331 N.Y.S.2d 382, 386-90 (1972).

[65] CPLR 1402. Contribution may be sought in a separate action, or by way of counterclaim, cross-claim, or third-party claim in the underlying action. CPLR 1403. Each joint tortfeasor is liable for his equitable share of the judgment which is "determined in accordance with [his] . . . relative culpability." CPLR 1402. When the claim for contribution is made in the underlying action, the plaintiff may amend his complaint within 20 days to assert a cause of action directly against the third-party defendant. CPLR 1009.

[66] 41 N.Y.2d 362, 361 N.E.2d 974, 393 N.Y.S.2d 323 (1977), *modifying* 49 App. Div. 2d 693, 370 N.Y.S.2d 760 (4th Dep't 1975).

[67] 41 N.Y.2d at 371, 361 N.E.2d at 980, 393 N.Y.S.2d at 330.

[68] Although the Court did not explain why Klinger failed to amend her complaint to state a cause of action directly against the Smiths, *id.* at 368, 361 N.E.2d at 978-79, 393 N.Y.S.2d at 328, it appears that the Smiths were not recognized as potential defendants until the statute of limitations had run. Telephone conversation with James N. Hite, Esq., attorney for appellant Klinger (Mar. 7, 1977).

[69] The Dudleys' motion for summary judgment had been granted following the entry of a preclusion order against plaintiff due to her failure to satisfy the Dudleys' demand for bills of particulars. Significantly, plaintiff's attorney had delayed more than 3 years in moving to vacate the conditional preclusion order. Klinger v. Dudley, 40 App. Div. 2d 1078, 339 N.Y.S.2d 223 (4th Dep't 1972) (mem.).

to Leone's cross-claim remained in the case as third-party defendants. The jury awarded Klinger damages of $300,000, apportioning 65% against Leone, 10% against the Smiths, and 25% against the Dudleys.[70] Leone was able to satisfy $10,000 of the judgment through an insurance policy, but he apparently had no other assets. To afford plaintiff further recovery, a judgment was entered permitting defendant to collect from the Smiths and Dudleys.[71] On appeal, the fourth department held that enforcement against these third-parties is conditioned "upon defendant Leone paying the full amount of the judgment rendered against him."[72]

The Court of Appeals modified the judgment of the appellate division, holding that recovery against the third-parties is dependent upon defendant satisfying "more than his proportionate share of the judgment."[73] In so ruling, the Court rejected Klinger's contention that a third-party defendant should not be permitted to avoid liability merely because the main defendant is not financially responsible. Judge Cooke, writing for a unanimous Court, emphasized that the holding in *Dole v. Dow Chemical Co.*,[74] codified in CPLR 1402, was not intended to safeguard the rights of the plaintiff; rather, its purpose was to provide for the allocation of fault among tortfeasors.[75] A plaintiff often is able to protect himself, the Court suggested, by directly asserting a cause of action against a third-party defendant.[76] In concluding its opinion, the *Klinger* Court distinguished its recent holding in *Rock v. Reed-Prentice Division of Package Machinery Co.*[77] There, the Court of Appeals permitted

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[70] 41 N.Y.2d at 365, 361 N.E.2d at 976-77, 393 N.Y.S.2d at 326.

[71] *Id.* at 365, 361 N.E.2d at 977, 393 N.Y.S.2d at 326.

[72] 49 App. Div. 2d 693, 693, 370 N.Y.S.2d 760, 761 (4th Dep't 1975) (mem.) (emphasis added).

[73] 41 N.Y.2d at 371, 361 N.E.2d at 981, 393 N.Y.S.2d at 330. In Valentino v. Thompson, 41 N.Y.2d 362, 361 N.E.2d 974, 393 N.Y.S.2d 323 (1977), a case consolidated with *Klinger* on appeal, plaintiffs were injured in an automobile accident while riding in a vehicle owned by their employer and operated by a fellow employee. Since plaintiffs' exclusive remedy against their employer and fellow employee was workmen's compensation benefits, *see* N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1976-1977), suit was brought against only the owner and the estate of the operator of the other vehicle involved in the collision. Plaintiffs' employer and the estate of the fellow employee, however, were impleaded by the defendants. The jury returned a verdict of $632,000, finding the defendants 75% responsible and the third-party defendants' employer and fellow employee's estate 25% liable for the damages. Defendants had no assets other than insurance policies which paid only $20,000 of the judgment. 41 N.Y.2d at 366-67, 361 N.E.2d at 977-78, 393 N.Y.S.2d at 326-27.

[74] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[75] 41 N.Y.2d at 367-69, 361 N.E.2d at 978-79, 393 N.Y.S.2d at 327-28.

[76] *Id.*

[77] 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976), *discussed in* CPLR 1402, commentary at 373-74 (McKinney 1976).

enforcement of a judgment against a third-party defendant even though the defendant had not paid more than his *Dole* share to the plaintiff.[78] Judge Cooke explained that in *Rock*, while the amount recovered from the main defendant was not in excess of his *Dole* share, it had been paid in full settlement of his obligation to the plaintiff.[79] Once settlement in full has been made, the judge reasoned, the *Rock* decision allows the defendant to obtain contribution from other jointly-liable parties.[80] Since no settlement had been reached in *Klinger*, the Court concluded that *Rock* was inapposite.

It is submitted that the *Klinger* holding is both sound and consistent with the principles underlying the concept of contribution.[81] Nevertheless, since plaintiff is left with a meager prospect of collecting most of his $300,000 judgment, the result seems harsh. In seeking methods to avoid this situation in the future, the practitioner should consider the *Klinger* Court's explicit holding that defendant must have paid "more than his proportionate share of the judgment"[82] to plaintiff to be entitled to contribution from a third-party defendant. This would appear to eliminate the possibility of a defendant obtaining contribution upon payment of an amount equal to his *Dole* share.[83] Therefore, plaintiffs must be careful to

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[78] 39 N.Y.2d at 41-42, 346 N.E.2d at 524, 382 N.Y.S.2d at 723-24.

[79] 41 N.Y.2d at 371, 361 N.E.2d at 980, 393 N.Y.S.2d at 330.

[80] *Id.* Under *Rock*, a defendant who possesses assets in an amount insufficient to satisfy the entire judgment is encouraged to settle with the plaintiff. By settling, defendant may obtain contribution from his joint tortfeasors without paying in excess of his *Dole* share of the entire judgment amount.

[81] Prior to *Klinger*, most authorities had concluded that a defendant may not obtain contribution until he has paid more than his proportionate share to plaintiff. *See* Adams v. Lindsay, 77 Misc. 2d 824, 826-27, 354 N.Y.S.2d 356, 358-59 (Sup. Ct. Monroe County 1974); CPLR 1402, commentary at 372-73 (McKinney 1976); *id.* 3019, commentary at 278-79 (McKinney 1974); McLaughlin, *Legislation—I*, N.Y.L.J., June 14, 1974, at 1, col. 1, at 2, col. 3; 2A WK&M ¶ 1402.01. This rule appears to be based upon the principle that a right to indemnification does not arise until a loss is sustained. *See* RESTATEMENT OF RESTITUTION §§ 76-77 (1937); *cf.* 2 S. WILLISTON, THE LAW OF CONTRACTS § 345, at 772 (3d ed. W. Jaeger 1959). Since the right to contribution under *Dole* amounts to partial indemnification, *see* W. PROSSER, THE LAW OF TORTS § 51, at 310 (4th ed. 1971), it would seem proper to require that the defendant satisfy more than his proportionate share of the judgment, thereby sustaining an actual loss, prior to receiving contribution.

In Bonwit-Teller v. Rosenstiel, 75 Misc. 2d 108, 347 N.Y.S.2d 753 (N.Y.C. Civ. Ct. N.Y. County 1968), however, the court allowed a defendant to enforce a judgment against a third-party defendant before defendant had paid anything to the plaintiff. Significantly, *Rosenstiel* involved a joint contractual obligation which, the court noted, "is absolute, and not merely an indemnification against loss." 75 Misc. 2d at 110, 347 N.Y.S.2d at 755. Presumably, this language indicates that the *Rosenstiel* court would have reached a different result had the case involved a *Dole* situation.

[82] 41 N.Y.2d at 372, 361 N.E.2d at 981, 393 N.Y.S.2d at 330 (emphasis added).

[83] Although in *Klinger*, the fourth department stated that defendant was entitled to

locate financially responsible parties and ensure that all causes of action are asserted directly against them. In addition, settlements accompanied by releases of liability should only be entered into in full knowledge of the financial strength of the remaining parties.[84] The *Klinger* decision indicates that the Court of Appeals will require strict adherence to the statutory mechanism for obtaining contribution. If properly used, New York procedural law provides the means to ensure that those responsible for the injury to the plaintiff are liable directly to him on the judgment.[85]

CPLR 1402: Defense of laches may be interposed in separate action for Dole *contribution.*

Actions for indemnity in New York traditionally have been analogized to claim in quasi-contract and hence governed by the 6-year contract statute of limitations.[86] With the advent of a right to contribution among joint tortfeasors, it was widely assumed that the 6-year limitation period would control these actions as well.[87] Recently, however, in the case of *Blum v. Good Humor Corp.*,[88] the Appellate Division, Second Department, qualified this 6-year time limitation by holding that laches may be interposed as a defense in an action for contribution among joint tortfeasors.[89]

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contribution "upon . . . paying the full amount of the judgment rendered against him," 49 App. Div. 2d 693, 693, 370 N.Y.S.2d 760, 761, prior authority had indicated that defendant need only pay an amount in excess of his *Dole* share to be eligible for contribution. *See* Adams v. Lindsay, 77 Misc. 2d 824, 826-27, 354 N.Y.S.2d 356, 358-59 (Sup. Ct. Monroe County 1974); CPLR 3019, commentary at 276-79 (McKinney 1974); 2A WK&M ¶ 1402.01. The *Klinger* Court agreed with the latter interpretation. 41 N.Y.2d at 372, 361 N.E.2d at 981, 393 N.Y.S.2d at 330. Therefore, under *Klinger*, a defendant who has paid only an amount equal to his equitable share is not entitled to contribution.

[84] General Obligations Law § 15-108 provides that a release given by a plaintiff to one of several tortfeasors does not release the other tortfeasors from liability. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1976-1977). The amount that may be obtained from the unreleased tortfeasors, however, may exceed neither their *Dole* shares nor the amount of the judgment as reduced by the consideration received by the plaintiff for the release. *Id.; see id.*, commentary at 139-40.

[85] *See* note 65 *supra.*

[86] A cause of action for indemnity is predicated upon a contract implied in law; the 6-year contract statute of limitations, which also governs suits in quasi-contract, therefore has been held applicable. *See* Moran Transp. Corp. v. Lehigh Valley R.R., 126 F. Supp. 122, 123 (S.D.N.Y. 1954); Wechsler v. Bowman, 285 N.Y. 284, 294, 34 N.E.2d 322, 327 (1941); Smith v. Smucker, 198 Misc. 944, 947-48, 100 N.Y.S.2d 35, 38-39 (Sup. Ct. Nassau County 1950); Liberty Mut. Ins. Co. v. Societe Coiffure, Inc., 50 N.Y.S.2d 40, 41-42 (Sup. Ct. N.Y. County 1944).

[87] *See* Occhialino, *Contribution*, NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 230 (1974).

[88] 57 App. Div. 2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977).

[89] *Id.* at 912, 394 N.Y.S.2d at 896.